

Ea11mtbC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 In Re: Methyl Tertiary Butyl
Ether ("MTBE") Products
5 Liability Litigation

6 00-CV-1898 (SAS)

7 Conference
8 -----x

9 New York, N.Y.
10 October 1, 2014
11 2:42 p.m.

12 Before:

13 HON. SHIRA A. SCHEINDLIN,

14 District Judge

15 APPEARANCES

16 WEITZ & LUXENBERG P.C.
17 Liaison Counsel for Plaintiffs
18 BY: WILLIAM A. WALSH, ESQ.

19 MILLER & AXLINE LLP
20 Attorneys for Plaintiffs (PR, NJ, & PA)
21 BY: MICHAEL D. AXLINE, ESQ.

22 JACKSON GILMOUR & DOBBS, PC
23 Attorneys for Plaintiffs (PR)
BY: JOHN D.S. GILMOUR, ESQ.

24 LAW OFFICES OF JOHN K. DEMA, P.C.
25 Attorneys for Plaintiffs (PR)
BY: JOHN K. DEMA, ESQ.
NATHAN SHORT, ESQ.

COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, L.L.P.
Attorneys for Plaintiffs (NJ)
BY: LEONARD Z. KAUFMANN, ESQ.

Ea11mtbC

1 APPEARANCES
2 (Continued)3 MCDERMOTT, WILL & EMERY, LLP
4 Attorneys for Defendants Esso/Exxon (and Liaison Counsel)
BY: JAMES A. PARDO, ESQ.
5 STEPHEN J. RICCARDULLI, ESQ.6 ARCHER & GREINER PC
Attorneys for Defendants Esso/Exxon
BY: WILLIAM J. STACK, ESQ.7 MOUND COTTON WOLLAN & GREENGRASS
8 Attorneys for Defendant Trammo
BY: BARRY R. TEMKIN, ESQ.
9 CHRISTOPHER D. AMORE, ESQ.10 THOMPSON & KNIGHT LLP
11 Attorneys for Defendant Petrobras
BY: DAVID C. SCHULTE, ESQ.12 KING & SPALDING, LLP
13 Attorneys for Defendants Chevron and Unocal
BY: CHARLES C. CORRELL, ESQ.14 EIMER STAHL LLP
15 Attorneys for Defendant CITGO
BY: LISA S. MEYER, ESQ.16 SEDGWICK LLP
17 Attorneys for Defendant Shell
BY: PETER C. CONDRON, ESQ.
DAVID M. COVEY, ESQ.18 SEPULVADO & MALDONADO
19 Attorneys for Total Petroleum Puerto Rico Corp.
BY: ALBENIZ COURET-FUENTES, ESQ.20 SÁNCHEZ-BETANCES, SIFRE & MUÑOZ-NOYA, PSC
21 Attorneys for Defendant
BY: ADRIAN SANCHEZ-PAGAN, ESQ.

Ea11mtbc

1 (Case called)

2 THE COURT: Good afternoon, Mr. Walsh.

3 MR. WALSH: Good afternoon, your Honor.

4 THE COURT: Mr. Axline.

5 MR. AXLINE: Good afternoon, your Honor.

6 THE COURT: Mr. Gilmour.

7 MR. GILMOUR: Good afternoon, your Honor.

8 THE COURT: And Mr. Dema.

9 MR. DEMA: Good afternoon, your Honor.

10 THE COURT: Mr. Pardo.

11 MR. PARDO: Good afternoon, your Honor.

12 THE COURT: And Mr. Riccardulli.

13 MR. RICCARDULLI: Good afternoon.

14 THE COURT: Mr. Stack.

15 MR. STACK: Good afternoon, your Honor.

16 THE COURT: Mr. Correll.

17 MR. CORRELL: Good afternoon.

18 THE COURT: Ms. Meyer.

19 MS. MEYER: Good afternoon, your Honor.

20 THE COURT: Mr. Schulte.

21 MR. SCHULTE: Good afternoon, your Honor.

22 THE COURT: Is it Mr. Couret?

23 MR. COURET FUENTES: Couret, yes, your Honor. Good
24 afternoon, your Honor.

25 THE COURT: Mr. Sanchez?

Ea11mtbC

1 MR. SANCHEZ PAGAN: Good afternoon, your Honor.

2 THE COURT: Mr. Condron.

3 MR. CONDRON: Good afternoon, your Honor.

4 THE COURT: And all those who aren't on the seating
5 chart, good afternoon to all of you.

6 COUNSEL: Good afternoon.

7 THE COURT: So we have a lot of submissions but maybe
8 not a terribly long agenda. I have of course the joint agenda
9 that you submitted. September 22nd, I received the
10 defendant's preconference letter; a September 22nd
11 plaintiff's preconference letter; September 24th, defendant's
12 preconference reply letter; and September 25th, plaintiff's
13 preconference reply letter; and then September 29th, another
14 defendant's reply letter, I guess having to do with the
15 certification issues.

16 So the agenda that I see is: first, the Puerto Rico
17 case, then the Pennsylvania case, and then the New Jersey case.
18 And the Pennsylvania and New Jersey cases really have no
19 contested issues to discuss, so we probably should just take
20 them out of order and be done with them.

21 One moment. I just want to make sure what the issue
22 is.

23 Okay. In Pennsylvania, the parties want to discuss
24 the proposal extending the deadline to answer or move to
25 October 31, 2014. Is that still what the defense wants?

Eallmtbc

1 MR. AXLINE: Well, your Honor, we discussed this in
2 advance, and the Commonwealth now plans to file an amended
3 complaint, and that development occurred after the defendants
4 approached us with their answer time, so we worked out, subject
5 to the court's approval, a schedule which would give the
6 Commonwealth 30 days to file an amended complaint.

7 THE COURT: 30 days from now?

8 MR. AXLINE: From now. And the defendants 30 days to
9 file responsive pleadings or an additional 30 days if, after
10 seeing the amended complaint, they decide that they need that.
11 We would have no objection.

12 THE COURT: Is it a relatively new case?

13 MR. AXLINE: Yes, it is.

14 THE COURT: Okay. So you would want until
15 October 30th to file the amended complaint. That's a
16 Thursday.

17 MR. AXLINE: Yes.

18 THE COURT: And then they would have till
19 November 28th if they choose to answer, or December 23rd,
20 so it won't be Christmas Eve, to move if they wish to move.
21 That would be the schedule?

22 MR. AXLINE: That's the proposed schedule, your Honor.

23 MR. PARDO: Actually, that may be right. I didn't
24 know that we were putting answers and responsive pleadings on I
25 guess separate tracks.

Eallmtbc

1 THE COURT: Well, we are. In other words, if you're
2 going to answer, just do it. It's not very hard to answer. It
3 usually reads denied, denied, denied, and denied. So it's
4 really not all that hard. But seriously, if you're going to
5 move, then you want the two months to write it out.

6 MR. PARDO: That's correct.

7 THE COURT: But you'll know which it is within 30 days
8 from receiving it. After all, it's an amended complaint. And
9 you've all been doing MTBE litigation for a long time. Surely
10 you can read the complaint and know whether you intend to move
11 or whether you intend to answer, or sometimes both. Sometimes
12 you want to file an answer and do a 12(c) and I don't know. So
13 we'll have dates set for that too. So let's just say if you're
14 going to answer, it is November -- I think I said 28th but
15 that's the Friday after Thanksgiving, so again, to avoid that
16 problem, let's just call it the 25th. So October 30th for
17 the amended complaint; November 25th for any answer; and
18 December 23rd for any motion. That's done.

19 MR. PARDO: That's fine. We have master answers on
20 file as well. I think we'll probably need to change those.

21 THE COURT: Right. I don't know what this amended
22 complaint looks like and how it would relate to the
23 consolidated amended complaint. It may look different. It's
24 many years later. Maybe they're writing the complaints
25 differently. I have no idea.

Ea11mtbc

1 MR. AXLINE: If there is a surprise, your Honor, and
2 the defendants feel like they need more time, I don't think --

3 THE COURT: Please don't be generous with my schedule.
4 I keep telling you I'd like to live through the MTBE
5 litigation. Every time you add months, it gets less likely,
6 Mr. Axline. And soon it may be your issue too, but right now
7 it's my issue.

8 So in any event, that takes care of Pennsylvania.

9 Now let's take a look at New Jersey. I think you
10 wanted to do an update on settlements, but I've signed off on
11 the materials I received. Yes, Mr. Axline?

12 MR. AXLINE: If your Honor is saying you've signed
13 the --

14 THE COURT: I did. This morning.

15 MR. AXLINE: Thank you very much.

16 THE COURT: I read it all carefully. I understand how
17 you resolved the issue I had before. Defendants seemed ready
18 to sign and did, plaintiffs seemed ready to sign and did, I see
19 no reason for the court to stand in the way, so I signed, and
20 did, and docketed. So it's done.

21 MR. AXLINE: Fine. I'll sit down. Thank you.

22 THE COURT: All right. So the only items we have
23 today relate to Puerto Rico, right? All right.

24 So the first one is the plaintiff's request for
25 certification of an interlocutory appeal of this issue of this

Ea11mtbc

1 Law 53 order, and I'll be happy to hear you. It seems like you
2 want to be heard, Mr. Gilmour.

3 MR. GILMOUR: Yes, your Honor. Your Honor, I think
4 the standard for a 1292(b) is clear, and I believe the court's
5 aware but just for purposes of stating it --

6 THE COURT: I'm surely aware of it because I get a
7 request every two months on some case or another.

8 MR. GILMOUR: Yes, your Honor. To guide my
9 discussion, I'd just like to recite it. One, you need to show
10 a controlling question of law; two, a substantial ground for
11 difference of opinion; and three, immediate appeal from the
12 order may materially advance the ultimate termination of the
13 case. Our position, your Honor, is that the Commonwealth has
14 met all three of these factors regarding the court's August 29,
15 2014 order related to Law 53.

16 In preparing for this hearing, Judge, I went back and
17 I read through a lot of caselaw, a lot of motions, a lot of
18 letter briefing, transcripts, pretty much everything I could
19 get my hands on, and I came to one universal truth that I think
20 permeates this issue and it's that Puerto Rico, your Honor, is
21 truly a unique jurisdiction. It is one of only two
22 jurisdictions in the United States that is based on the civil
23 code. It is the only civil code jurisdiction in the United
24 States that is based on Spanish civil code. It has a unique
25 Spanish history dating back hundreds of years. That was only

Ea11mtbc

1 relatively, in terms of a country's history, relatively
2 recently impacted by Anglo-American influence after the
3 Spanish-American War. The primary language spoken there is
4 English. Cases are tried --

5 THE COURT: Is English?

6 MR. GILMOUR: I'm sorry, your Honor, Spanish. Thank
7 you. Cases are tried there in Spanish. Laws are written in
8 Spanish. The legislature is conducted in Spanish. Orders are
9 written in Spanish. And because of that, no other jurisdiction
10 in the United States is like Puerto Rico.

11 THE COURT: And where would an interlocutory appeal be
12 heard?

13 MR. GILMOUR: I believe it would be heard by the
14 Second Circuit, your Honor.

15 THE COURT: Second.

16 MR. GILMOUR: Yes, your Honor.

17 THE COURT: Which Puerto Rico is in the First.

18 MR. GILMOUR: Yes, your Honor, but arising out of the
19 MDL court, I believe it would go to the Second Circuit.

20 THE COURT: Does defense counsel agree any such appeal
21 would be to the Second Circuit?

22 MR. PARDO: I believe so, your Honor, yes.

23 MR. GILMOUR: Because of the uniqueness of Puerto
24 Rico, Judge, as you know, Law 53 itself had to be translated.
25 I stood before you at one of our case management conferences

Ea11mtbc

1 and said I did not have a translation for you yet, I had to get
2 it translated. We had to translate the legislative history, we
3 had to translate every possible case that might apply to it, we
4 had to translate agency's comments on Law 53, and all of this
5 to be done within a time frame that was understandable but
6 difficult to deal with, so to comply with that, I know that on
7 the Commonwealth side, we employed multiple translation
8 companies from Puerto Rico, Texas, and California. And I know
9 that defendants employed at least one if not more translation
10 companies to do that. At the end of the day none of these
11 translations -- nobody was able to compare them. We had
12 originally talked about sharing translations and trying to get
13 it done and compare them, but it just was not possible. I say
14 that because what we have all been tasked with doing is parsing
15 the words of this law, Law 53, and the cases that apply to it
16 and --

17 THE COURT: Let me understand. Whether you win or
18 whether you lose an appeal, the case would not be over, right?
19 There's going to be a case to be tried.

20 MR. GILMOUR: Yes, your Honor.

21 THE COURT: It's just that some defendants may be in
22 it, some defendants may not be in it, but there has to be a
23 case to be tried, right?

24 MR. GILMOUR: Yes, your Honor.

25 THE COURT: So at the end of that case, some day,

Ea11mtbc

1 there would be an appeal and that appeal could raise this Law
2 53 issue in the First Circuit, right?

3 MR. GILMOUR: Yes, your Honor, if the case is remanded
4 to the District of Puerto Rico for trial.

5 THE COURT: Not if. It will be if anybody's left.
6 Unless all defendants have settled, that's exactly where it
7 will be tried and any appeal would be in the First Circuit,
8 including this issue, which deals with issues in Puerto Rico
9 all the time on appeal. I mean, there's a certain efficiency
10 to say the case won't end by whatever happens in the Second
11 Circuit. There will just be more or less defendants. At the
12 end of the day, at the end of the trial, all issues would go to
13 the First Circuit and the First Circuit would interpret Puerto
14 Rico law, which apparently it's familiar with doing and has
15 dealt with this Spanish issue before, and there's really no
16 grounds for difference of opinion in the sense that nobody else
17 is going to talk about this particular law. There's not going
18 to be a circuit split or anything like that. At the end of the
19 day, appellate review will be appropriate in the First Circuit.
20 I sort of like that idea.

21 MR. GILMOUR: Yes, your Honor, and in fact --

22 THE COURT: Why involve the Second Circuit, which
23 knows nothing about Puerto Rico in particular?

24 MR. GILMOUR: In preparing for this, your Honor, I
25 looked at a number of First Circuit Court of Appeals opinions

Ea11mtbc

1 that dealt with Puerto Rico as well as United States Supreme
2 Court opinions that dealt with Puerto Rico, and in each of
3 those instances, your Honor, due to the very issues that we've
4 just been talking about, every one of those cases, the
5 appellate court certified the issue to Puerto Rico Supreme
6 Court because of these issues.

7 THE COURT: Which I didn't have the option of doing.

8 MR. GILMOUR: We did request that it be certified,
9 your Honor, back after the December 30th --

10 THE COURT: I could have certified this to the Puerto
11 Rico Supreme Court?

12 MR. GILMOUR: Yes, your Honor.

13 THE COURT: I must have missed that beat, or at least
14 I don't recall it.

15 The defense is looking at each other and deciding
16 whether that was really requested. Do you recall that being
17 requested, Mr. Pardo?

18 MR. PARDO: I have no recollection of such an
19 application, your Honor.

20 MR. GILMOUR: If I may be clear, your Honor, there was
21 not a separate motion to certify the issues to the Puerto Rico
22 Supreme Court. It was raised as an alternative I believe in
23 the motion to reconsider your December 30, 2013 order, and it
24 was also raised I believe in the letter briefing on Law 53 that
25 preceded the oral argument on Law 53 prior to your Honor's

Ea11mtbc

1 29th of 2014 order. But Mr. Pardo is correct that there was
2 not a separate motion to certify the issue.

3 THE COURT: Could you still do that and bypass the
4 Second Circuit?

5 MR. GILMOUR: Yes, your Honor, but it would be at your
6 discretion.

7 THE COURT: Right. I got that. That would be a
8 better court to look at this than the Second Circuit, in my
9 opinion.

10 MR. GILMOUR: Yes, your Honor.

11 THE COURT: My order of preference would be Puerto
12 Rico Supreme Court, First Circuit, last of all, the Second
13 Circuit. That is my order of preference for review if there's
14 going to be review.

15 MR. GILMOUR: If it would be permissible by your
16 Honor, then we would move to have the issue certified to the
17 Puerto Rican Supreme Court from your Honor's court. I think
18 that would be the fastest resolution of the issue.

19 THE COURT: That's another issue. I think it would
20 take a really long time in the Second Circuit. Really long
21 time. And maybe this Puerto Rico Supreme Court would have a
22 good reason to do it faster.

23 MR. GILMOUR: I think so, your Honor, and in fact,
24 because again -- and forgive me for a moment, but in looking at
25 all of these cases, particularly from the First Circuit, the

Ea11mtbc

Puerto Rico Supreme Court, and I quote, your Honor, it says, "We have recently and repeatedly welcomed the federal court's willingness to resort to this court by way of a certification mechanism when addressing unresolved questions of Puerto Rican law. We have stated that the respect shown by federal courts for Puerto Rico law and caselaw contributes to the improvement of the relationship between federal and Puerto Rican jurisdictions." So --

THE COURT: Well, I sort of like that idea. I haven't heard from the defense, and I'm sorry I missed that beat that you raised in letters and reconsiderations briefing, but if I were to do that now, we would continue to prepare this case for trial and remand. I mean, my other issue is that I'm about to have summary judgment motions that could moot this issue, isn't that right? Theoretically.

MR. GILMOUR: Theoretically I believe it could moot the issue as to certain defendants, your Honor, but not as to all defendants.

THE COURT: Not as to all. But there's no reason they couldn't go forward simultaneously.

MR. GILMOUR: Agreed, your Honor.

THE COURT: I like that idea.

Let me hear from the defense. Why shouldn't I certify this question to the Puerto Rico Supreme Court, which really would have been the best jurisdiction to interpret its own law

Ea11mtbc

1 anyway and you go ahead with your seven summary judgment
2 motions or whatever it is and while you'd be getting that
3 briefing done and getting those issues decided, you could
4 hopefully move promptly in the Supreme Court, get it briefed
5 and maybe decide, if there's going to be a trial, it doesn't
6 turn out to be piecemeal, it would have all the available
7 defendants. If the Puerto Rico Supreme Court agrees with me,
8 then we know there will be less defendants at trial; if they
9 disagree, there will be more defendants at trial. Why isn't
10 this sort of a good idea? Because waiting to the end of the
11 trial and then an appeal to the First Circuit, which will
12 probably only certify to the Puerto Rico Supreme Court, seems
13 amazingly inefficient, especially if the Puerto Rico Supreme
14 Court says, given Law 53, these defendants are back in and you
15 have to try it again, the plaintiffs have to try it again
16 against those defendants. That does seem somewhat nutty.

17 MR. PARDO: With the caveat that this was not part of
18 the application so I have not looked at any of this --

19 THE COURT: I understand that, it's come up today, but
20 I like it. I like it. It's the right place for the issue. I
21 knew the Second Circuit was the wrong place for the issue. But
22 this sounds like the right place for the issue.

23 MR. PARDO: Well, I don't practice regularly in Puerto
24 Rico. I'm told that this process takes a great deal of time.

25 THE COURT: Oh. Mr. Gilmour said he thought it would

Ea11mtbc

1 happen rapidly.

2 MR. GILMOUR: Yes, your Honor. It's my understanding
3 that the Puerto Rico Supreme Court is amenable to receiving
4 certain certified questions, and I can't tell you an exact time
5 frame.

6 THE COURT: No, no one can tell an exact time frame.
7 We'd all like to find that out for all our appellate issues,
8 but there should be estimates. Mr. Pardo seems to know that it
9 takes a very long time. I thought you indicated you thought it
10 wouldn't. There are some lawyers here from Puerto Rico today.
11 They may have more of a sense of how long an appeal takes once
12 it's presented. I will say, this is a narrow appeal. There's
13 no record. This is not like a record of an eight-week trial or
14 something. There's no transcript. I mean, this is easy. This
15 is easy. It's pure law.

16 MR. COURET FUENTES: Your Honor, if I may. Having
17 practiced before the Puerto Rico Supreme Court, I can tell you
18 usually it takes between six months to a year for certified
19 questions to be answered, sometimes more. You will find cases
20 from the First Circuit actually saying that the Supreme Court
21 took too long and that delayed the litigation.

22 Let me just also point out that the first step, which
23 would also take several months, is that after you issue an
24 order certifying the case, if you do so, under Rule 25 of the
25 Puerto Rico Supreme Court, they would have to decide first and

Ea11mtbc

1 there will be briefing on whether they should accept the
2 certification, and then after that, go through the whole
3 court --

4 THE COURT: But if they turn it down, we'll get that
5 answer fairly promptly. If they take it, the parties could ask
6 for expedited briefing on the theory that there's a number of
7 other defendants and an imminent trial and maybe they'll get
8 it. So I still think it sounds like a good idea.

9 MR. COURET FUENTES: Right. That would be part of the
10 time frame that it would take before the certification and
11 final decision.

12 THE COURT: Right. I understand that. I get that.
13 But if they turn it down, that idea is done. And I think once
14 they turn it down, if they do, I'm not going to be certifying
15 to the Second Circuit. I know that. And that's the only
16 circuit I can certify to, so that's that. That's going to get
17 denied. But I like this idea. If they take it, then it's six
18 months to a year, but by the time this case is really scheduled
19 for trial, it's probably six months to a year, and all these
20 other motions are coming in. Do we have a briefing schedule on
21 the seven?

22 MR. GILMOUR: We do, your Honor.

23 THE COURT: When is it fully briefed?

24 MR. RICCARDULLI: It's scheduled for the 28th. It's
25 the Friday after Thanksgiving, the reply papers.

Ea11mtbc

1 THE COURT: That's the final brief would be end of
2 November.

3 MR. RICCARDULLI: Yes, your Honor.

4 THE COURT: So if I do this fast, you may have a
5 declination within three months.

6 MR. COURET FUENTES: I've filed for petitions for
7 cert, and it can take up to six months and usually the whole
8 process will take over a year. So that's for your
9 consideration.

10 THE COURT: That's helpful but that's not
11 unanticipated. It's not going to be any faster any other way.

12 Did you want to add something?

13 MR. SANCHEZ PAGAN: No, thank you.

14 THE COURT: No. Back to you, Mr. Pardo. I'm inclined
15 to give this a try to get this issue of Puerto Rico law
16 finalized because it would be inefficient, as I say, to try
17 this case to verdict, take an appeal to the First Circuit, have
18 the First Circuit certify the Law 53 question to the state
19 court. I mean, it's not going to be good. And they may not
20 take it and I think that will be the end of the road for the
21 plaintiffs, but if they take it, might as well know what they
22 have to say, in time for the trial.

23 MR. PARDO: I understand your inclination. I think
24 that this approach falls potentially victim to the same issues
25 that we'd have if we typically did this under 1292. I would

Ea11mtbc

1 like the opportunity, though, because I haven't looked at this,
2 to go and look at the cases that Mr. Gilmour is referring to --

3 THE COURT: He's got a notebook of them where the
4 First Circuit --

5 MR. PARDO: -- and send you a letter.

6 THE COURT: Why?

7 MR. PARDO: Because we haven't been heard on it.

8 THE COURT: I don't want to waste very much time on
9 it. I'll give you a week, but the bottom line is, he's got the
10 stack of cases that he can give you. You don't have to go on
11 your own research machine. He can give you his stack.

12 MR. PARDO: I don't have a research machine.

13 THE COURT: I know, but you don't need it. Take a
14 look at his stack. You'll see that the First Circuit often
15 says this is an issue of Puerto Rican law. Let the Puerto
16 Rican court tell us what their view is, we'll take it back from
17 there. Obviously the Second Circuit does that too on New York
18 questions. But it is a question of Puerto Rico law. The
19 legislature passed this act. I have my views on whether it
20 should apply to this case or not, but they did pass it. So
21 it's going to end up there, through the First Circuit, at the
22 end of the day, and it just seems efficient to start the
23 process now.

24 So all I can say for this oral argument is, I'm going
25 to sign this order, which you'll draft the language. I want to

Eallmtbc

1 do it as fast as possible, so if you want a week to look at
2 his, he's happy to give you all the citations that he put
3 together. Take a look. But really, why oppose it? I mean, if
4 they're going to say no, good, that will be done. If they're
5 going to say yes, I have all your motions to decide, lots of
6 little discovery things that are still in today's conference
7 we've got to get to and it's got to get remanded, then some
8 fortunate or unfortunate judge has to clear three months to
9 figure out a trial date. You know it's going to take time.
10 That's just life.

11 MR. PARDO: It's just issues of Puerto Rican law come
12 up all the time in federal courts and they're not all referred
13 to the First Circuit.

14 THE COURT: But this isn't just any issue. This is
15 the legislature of a Commonwealth. Anyway, this is a
16 legislature of a Commonwealth passing a law and some judge
17 unrelated to Puerto Rico sitting in New York, you know, says
18 what it means or doesn't mean and how it applies to this case
19 or not. That's pretty unique. Of course the First Circuit
20 doesn't send every issue to the Puerto Rican courts just like
21 Second Circuit doesn't send every issue of New York law to New
22 York courts. But the ones they do send tend to be first
23 impression that they feel, in deference, the state court should
24 decide. We get issues of New York law every day, but none of
25 them are certified because there's reams and reams of history.

Ea11mtbc

1 This is not true here. This is a new statute.

2 MR. PARDO: But the applicability of prescription is
3 not a new issue, your Honor, as you know. You've seen these
4 cases. We believe you decided this issue correctly. I think,
5 again, with the caveat I haven't looked at any of the cases on
6 this, I think we're talking about piecemeal -- we've been
7 focused on their application for 1292 --

8 THE COURT: I know.

9 MR. PARDO: I think we're talking about piecemeal
10 appeal and delay.

11 THE COURT: I don't think there's going to be any
12 delay, actually, and I think that whether it's the First or the
13 Second Circuit, they're going to send it to Puerto Rico, and
14 I'm not inclined to give a 1292(b) anyway. I don't think it
15 really meets the standard, but I look at it as my failure. I
16 didn't pick up on the request earlier to send it to the Puerto
17 Rico Supreme Court. My oversight. If I'd really noticed that,
18 I might have done it.

19 MR. PARDO: I frankly don't recall it either, your
20 Honor.

21 THE COURT: So you're forgiving me then. I appreciate
22 that. I appreciate that.

23 MR. PARDO: I'm also suggesting, I'm not sure it was
24 made as clearly as it might have been. I don't know.

25 THE COURT: That may be too. Maybe not as clearly as

Ea11mtbc

1 it might have been, but if they say it was in the papers
2 somewhere, it probably was and it was my oversight. But it
3 does seem the right place for the issue to me.

4 So I'm not going to grant it today but I want to move
5 very quickly. To lose time back and forth with long briefs
6 here doesn't make any sense. So Mr. Gilmour, you don't need to
7 write a brief. You've made the application quite formally
8 today. And will you share your list of cases of First Circuit,
9 all of them, with the defense, right after the meeting, today?

10 MR. GILMOUR: Yes, your Honor.

11 THE COURT: Take a look. Do you want to have a
12 letter, Mr. Pardo? Do you want to have a letter or brief to me
13 in a week?

14 MR. PARDO: A week. We need a week.

15 THE COURT: Sure. I just said would you have a letter
16 or brief to me. Today is October 1st, so by October 8th, a
17 letter or brief, whichever you prefer.

18 MR. PARDO: I think it would be easier for your Honor
19 if we did a letter.

20 THE COURT: That's fine. Then double-space it,
21 though, out of pity.

22 And Mr. Gilmour, while you're not having to write a
23 brief, would you consider writing a proposed order?

24 MR. GILMOUR: Yes, your Honor, I will.

25 THE COURT: So I can see the language. And of course

Ea11mtbc

1 send it to your adversary of what such a certification order
2 would look like.

3 MR. GILMOUR: Yes, your Honor.

4 THE COURT: And copy to the defendants, of course.

5 MR. GILMOUR: Of course.

6 THE COURT: Mr. Riccardulli?

7 MR. RICCARDULLI: Yes, your Honor. Just one thing,
8 because we talked about the summary judgment motions. The one
9 motion though that we contemplated filing did deal with statute
10 of limitations. If we're going to certify it down to Puerto
11 Rico, we'd have to wait for that decision before we could then
12 file the motion --

13 THE COURT: Because it's a motion that replicates the
14 two I've already decided?

15 MR. RICCARDULLI: Similarly. I think that was based
16 on the Commonwealth's knowledge about certain defendants. This
17 is more knowledge that relates to MTBE and the use in the
18 Commonwealth. So they're not identical but that motion is
19 waiting, so, you know, we're prepared to file that. I think we
20 said that before.

21 THE COURT: But it might turn on the --

22 MR. RICCARDULLI: It definitely turns on it.

23 THE COURT: Let me finish the sentence for the record.
24 It turns on the applicability of this Law 53.

25 MR. RICCARDULLI: It does. And the other point I'm

Ea11mtbc

1 making is, that's still going to be sitting around. We can't
2 work this case up truly for trial. That may need to be dealt
3 with. If it's not accepted in the first instance or denied or
4 your decision's upheld, we'd have to come back to the summary
5 judgment phase.

6 THE COURT: That's fine. I mean, I understand that.

7 MR. PARDO: What is the issue that will be certified?

8 THE COURT: I just said this. You were maybe
9 conferring and didn't hear. I said while you're taking the
10 week to write the letter, Mr. Gilmour should immediately
11 consider how he would draft the order and propose an order that
12 defines the issue to be certified. He will do that. Promptly.
13 Very promptly.

14 MR. GILMOUR: Yes, your Honor.

15 THE COURT: Maybe by this Friday.

16 MR. PARDO: Can we get that before we have to put our
17 letter in?

18 THE COURT: Could you do that? You need to just frame
19 that order. It would be top priority. Maybe close of business
20 this Friday, Mr. Gilmour.

21 MR. GILMOUR: Yes, your Honor. I think I can have it
22 by this Friday.

23 MR. PARDO: By this Friday would be fine.

24 THE COURT: Okay. I think that's where we stand on
25 the certification right now.

Ea11mtbc

1 All right. The next issue seems to be requests for
2 admissions. Mr. Stack?

3 MR. STACK: Yes, your Honor. There are three issues
4 embedded in that. One deals with requests for admissions that
5 we served on the Commonwealth, the other with responses to
6 discovery that the Commonwealth served on Esso or Exxon. I
7 spoke to my colleague Mr. Axline. We have worked out an
8 agreement and we do not have to submit that to the court.
9 There is a separate issue concerning PRASA though that will
10 have to be addressed by the court.

11 THE COURT: So that's the only one. You worked out
12 the --

13 MR. STACK: Yes.

14 THE COURT: All right. So we're just at the PRASA
15 one. Okay. So defendants here are asking the plaintiffs to
16 admit that PRASA has not taken certain actions related to MTBE.
17 For example, admit that to date, PRASA has not performed
18 remedial activities due to MTBE at any wells within the
19 plaintiff's delineation of the Shell No. 3042 trial site.
20 Defendants got an answer but they don't like the answer. They
21 qualified their answer by claiming they're unaware of certain
22 information, right?

23 MR. RICCARDULLI: Yes, your Honor.

24 THE COURT: And I know the argument is that they've
25 been working together and that they've turned over discovery

Ea11mtbc

1 previously on behalf of PRASA, and you also think that PRASA's
2 been cooperative and mined its data, so to speak, to aid the
3 plaintiff's case, so for them to say they're unaware of
4 information relating to all of PRASA's activities you say
5 really can't be credible since they're working together and
6 since they've answered other discovery requests with respect to
7 PRASA. And along those lines, PRASA is a covered person, as
8 we've defined it here, and plaintiffs have produced documents,
9 coordinated depositions, etc. But it's not a party.

10 So maybe I should hear from the plaintiffs first,
11 Mr. Riccardulli. What does it mean when you write, "Plaintiffs
12 admit that they are unaware of any activities undertaken by
13 PRASA due specifically to MTBE at the referenced wells, and
14 it's plaintiff's understanding that no testing or very limited
15 testing for MTBE or TBA has occurred at the referenced wells"?
16 How can you be qualifying things by saying "unaware" and "my
17 understanding"? I think as a matter of law, Mr. Axline, you
18 have a good argument that they're not a party and you really
19 cannot be compelled, so to speak, to answer for a party, but
20 having chosen to, what's with all these qualifications?

21 MR. AXLINE: Well, what the Commonwealth chose to do,
22 your Honor, was to facilitate responses from PRASA, but
23 Rule 36, request for admission is very different. As you know,
24 it binds a party and it makes much more serious consequences.

25 THE COURT: Right.

Ea11mtbc

1 MR. AXLINE: We do not represent PRASA, and PRASA has
2 its own attorneys, its own internal mechanisms, and it's a huge
3 organization. So, you know, we have tried to give the
4 defendants as complete an answer as we can, given the fact that
5 we're answering on behalf of the Commonwealth, and I think, you
6 know, for trial purposes, they can make what they will of this
7 request for admissions, but it is a complete admission with
8 respect to the state of the Commonwealth's knowledge.

9 THE COURT: So when you say you're unaware of
10 something, you mean what you say; you mean "not to our
11 knowledge." "They may have done it but not to our knowledge."
12 What investigation did you undertake to make that statement?

13 MR. AXLINE: We went through all of the Commonwealth's
14 files. We looked for communications. I mean, it's sort of the
15 standard search that we did for all of the responses to
16 requests for admissions to see if we had anything to allow us
17 to answer it definitively and unequivocally.

18 THE COURT: But did you request PRASA's cooperation by
19 saying, look through your files to give us the answer?

20 MR. AXLINE: We have asked PRASA for what it has on
21 the subject, and I guess we could add that to the response, but
22 what we can't do is respond on behalf of PRASA and say
23 definitively, this is an admission, because we know everything
24 that PRASA knows, that this didn't happen. Because the
25 Commonwealth doesn't know everything --

Ea11mtbc

1 THE COURT: All right. But you're saying you did make
2 an effort to obtain the information from them, so when you
3 wrote a phrase like, "It's our understanding that no testing or
4 very limited testing occurred at the referenced wells," what do
5 you mean by, "It's our understanding"? That means that's based
6 on our communications with PRASA?

7 MR. AXLINE: Yes. And the defendants have submitted
8 other discovery on this topic so we've given them documents
9 from PRASA, we've facilitated witnesses from PRASA. But now
10 they seem intent on us answering on behalf of PRASA, and we
11 simply can't do that.

12 THE COURT: Okay. Mr. Riccardulli?

13 MR. RICCARDULLI: Yes, your Honor, and I think you
14 touched on it when you said, you know, you choose to stand in
15 sort of the shoes of that third party, that nonparty. This is
16 a little bit different. This sort of process dates back to
17 2010 when the defendants served a third-party subpoena, a
18 nonparty subpoena, on PRASA. We then sought to enforce that
19 subpoena when there was a lack of a response from PRASA, and
20 that's when plaintiff's counsel stepped in and said, wait a
21 minute, let us facilitate this. We're going to help PRASA out.
22 There was a little bit of back-and-forth in terms of, well, are
23 you representing them or are you not? And ultimately it landed
24 where the Commonwealth said, we'll treat them as a covered
25 person. They answered interrogatories on behalf of PRASA,

Ea11mtbc

1 document requests, privilege logs. They prepped witnesses.
2 They even tried to use the Commonwealth's paid litigation
3 consultant as the 30(b)(6) for PRASA. When we tried to take
4 that deposition, which would have dealt with what remediation
5 was done at these focus sites.

6 THE COURT: Would have dealt with? You didn't take
7 that deposition?

8 MR. RICCARDULLI: We didn't take it because we were a
9 little bit concerned about the fact that we were getting the
10 litigation consultant --

11 THE COURT: But if it would have bound PRASA --

12 MR. RICCARDULLI: We weren't sure. We were
13 uncomfortable with this process. We raised that with you, your
14 Honor, that we were uncomfortable with it. But the answer
15 isn't just that the Commonwealth is not aware of any
16 activities. They continually say, it's our understanding that
17 no or very little. So the qualification isn't just, you know,
18 we're not aware of anything. They go on by saying a little bit
19 may have been done. And that's really a problem here. I mean,
20 we're asking them to admit that no --

21 THE COURT: They're not going to admit that. They're
22 not going to admit that it's none because they already wrote,
23 "or very limited." Look, I think the problem is, it's not a
24 great question for a request to admit anyways. And if it is,
25 it really has to be directed to PRASA. Now why you didn't take

Ea11mtbc

1 the deposition that would have pinned this down, that would
2 have bound the defendant, I don't know. 30(b)(6) binds an
3 entity. That's why the rule makers invented 30(b)(6), to bind
4 an entity. So maybe you need to go back and take the
5 deposition that you didn't take and bind PRASA to its answer,
6 but I really do think it's a separate entity from the plaintiff
7 and the plaintiff can't be compelled to give you a better or
8 different RFA.

9 I'm going to have to interrupt this all very briefly
10 for what I think will be a five-minute or less criminal matter.
11 Let me just double-check and see if that's true.

12 (Discussion off the record)

13 (Recess)

14 THE COURT: Okay. Now we were talking about PRASA and
15 I was giving you some preliminary thoughts that really I don't
16 see that plaintiff can bind PRASA to an answer. Even though I
17 understand that it has chosen to treat PRASA as a covered
18 person, respond to discovery, and has stated here in court
19 today on the record that it has inquired of PRASA to try to
20 move this along, but to actually make it a binding admission as
21 to the Commonwealth, I don't think that's appropriate. So if
22 you want an opportunity, given my ruling, to reopen a
23 deposition or take a deposition of PRASA that does bind them to
24 the very questions you're talking about, so be it, but you do
25 have documents, you do have interrogatory responses, you have

Ea11mtbc

1 this somewhat-in-between answer here. Now you need to pin
2 PRASA down. And I can't do it as a request for admission.

3 MR. RICCARDULLI: Understood, your Honor. Just one
4 thing here that might I think get us halfway. I understand
5 when plaintiff's counsel stood up and said, you know, we're
6 saying our understanding is, or we don't know, right, whether
7 or not they did it --

8 THE COURT: That's not quite what he said. He said we
9 actually made efforts to learn and it is our understanding that
10 no testing or very limited testing has occurred. I realize the
11 phrase "very limited" is not --

12 MR. RICCARDULLI: I don't know what that means.

13 THE COURT: It means pretty rare. Once in a long
14 while. Not very much. Not everywhere every time. That's the
15 best they can do. But it is an answer. If you want to pin it
16 down, you need to go to PRASA, and you can't do it by Rule 36,
17 so go ahead and try to pin it down with a deposition.

18 MR. RICCARDULLI: Your Honor, here's the thing. I
19 guess that we're a little bit -- I mean, for me, I sort of see
20 this as, you know, plaintiffs sort of injected themselves where
21 they thought it benefited them to sort of work with PRASA, and
22 now when I'm trying to get a request so I don't have to call
23 PRASA witnesses to trial, I'm trying to narrow issues for our
24 phase --

25 THE COURT: I understand that. Get the proper person

Ea11mtbc

1 to commit the proper party. PRASA is not a party to the
2 litigation.

3 MR. RICCARDULLI: I understand. I guess the concern
4 I've got is that I'm going to serve this notice on PRASA and
5 I'm going to get the Commonwealth's 30(b)(6) witness.

6 THE COURT: Doesn't matter because it will bind PRASA.
7 At that point at least you've bound PRASA to an answer that it
8 can't move from at trial. That's the whole point. You want to
9 pin down what people are going to say at trial. If you leave
10 it open, then PRASA could produce a witness at trial and
11 surprise you and say things that you've never heard before, so
12 you might as well pin them down.

13 MR. RICCARDULLI: Understood, your Honor. I'll confer
14 with my group and we'll confer with plaintiff's counsel.

15 THE COURT: Okay. Good. So I'm leaving that
16 opportunity open even if the time has run because you couldn't
17 know the answer.

18 Yes, Mr. Axline?

19 MR. AXLINE: I'm sorry, your Honor, but just to
20 clarify, I assume that that deposition's going to be limited to
21 the questions that are being asked in the RFA and it's not
22 going to --

23 THE COURT: It should, because they waived any other
24 opportunity. They had the chance to depose PRASA all along.
25 They did what they did and they didn't what they didn't, but

Ea11mtbc

now if they want answers to these questions, I'm giving them the opportunity to bind PRASA by a 30(b)(6) witness. Not that this is a narrow question, because if the answer is little or none, the little could take a day of deposition. What does little mean? So yes, it's limited, but it's not so limited, because I don't know if they've done one test or a hundred tests, I don't know at what locations, I don't know how many times, I don't know the results, so it kinds of depends on the answers, doesn't it, Mr. Axline?

MR. AXLINE: Yes.

THE COURT: But, yes, it's limited to these requests, but that could be broader than we think.

And the only other thing I had on the agenda was the Petrobras issue about statute of limitations but in a certain way, we may have already begun to cover that by this potential process of raising statute of limitations to a new court in a new way. What I had suggested there, as you know, because you were following up on my suggestion, was rather than do a motion again, you should basically try to work out a stipulated set of facts and saying: Based on your prior rulings, you would reach the same ruling. Of course we all reserve our rights to appeal that ruling as we do the other statute of limitations ruling in the appropriate time and in the appropriate place. Whether that's now by certification, whether it's at the end of the day by appeal to the First Circuit, I don't know, but I just didn't

Ea11mtbc

1 think it was worth briefing an entire new motion when I'm going
2 to come out the same way on the legal issue. Now if the fact
3 issues are so different, that's a different point, but I
4 thought you could try to work a stipulation out, and I
5 understood from the letter exchange that you were trying to.

6 Where were we up to? Your name again?

7 MR. SCHULTE: My name is David Schulte, your Honor, on
8 behalf of Petrobras. My understanding is that my partner Jim
9 Harris and Will Petit, counsel for the plaintiffs, have been
10 working for some time now on a stipulation, and so I think that
11 everything that your Honor has suggested is under way and I
12 don't anticipate any issues. I think the only issue would be a
13 reservation by the parties of all their rights.

14 THE COURT: Of course. And the plaintiffs must know
15 that too. Of course everybody's reserving their rights.

16 MR. GILMOUR: Your Honor, I would need to check with
17 Mr. Petit, but I was under the impression that this issue had
18 been resolved.

19 THE COURT: Okay. Maybe it has, but I haven't been
20 presented with a stipulation yet.

21 MR. GILMOUR: No, your Honor. That's correct.
22 Mr. Harris and Mr. Petit have been working on it, and it was my
23 understanding from Mr. Petit that it had all been resolved or
24 99 percent resolved.

25 MR. SCHULTE: Just to be clear, your Honor, we have an

Ea11mtbc

1 understanding. We are just ironing out the details of the
2 stipulation.

3 THE COURT: Good. So actually, I had nothing else on
4 the agenda today, but if there's any other items, I'm happy to
5 do it.

6 Mr. Riccardulli?

7 MR. RICCARDULLI: Yes, your Honor. Just one date, and
8 again, it relates to the Law 53 or the certification issue.
9 The Puerto Rico II complaint, our responsive date, there was
10 some indication that the defendants would move for statute of
11 limitations. You had stayed the response and pleading date in
12 Puerto Rico II I think until we spoke today. It sounds like it
13 needs to get further extended, but we just wanted to make sure
14 that we don't have a deadline in which our responsive pleading
15 to a complaint is due.

16 THE COURT: If one of the responses is a motion based
17 on statute of limitations and it is the plaintiff's request
18 that we build in delay by trying to get this certification
19 process going, then clearly they're going to have to agree to
20 adjourn your time to answer *sine die*. I mean, you can't
21 default them for not answering if they know that it depends on
22 the statute of limitations issue.

23 MR. GILMOUR: We'd agree, your Honor.

24 THE COURT: So you'll need to work out, again, a
25 stipulation extending time to answer. And it might have to

Ea11mtbc

1 read *sine die*. When does it expire now, your time to answer?

2 MR. RICCARDULLI: I think it's already run, but we
3 talked about that we would again address it today, and that's
4 why I'm raising it now.

5 THE COURT: I will say on the record that nobody's in
6 default. You're not to take a default, of course. But when we
7 work out whether or not I'm going to be certifying, then the
8 stipulation will follow suit. If I certify, it will be *sine*
9 *die* depending on the outcome of that. If I deny certification
10 anywhere, then we need to fix a new date, but right now I will
11 say, for the transcript record here, your time to answer is
12 stayed pending further order of this court. That protects you.

13 MR. RICCARDULLI: It does. Thank you.

14 THE COURT: Anything further today?

15 Should we be setting any other conference date? I
16 don't know what's going on in other cases. Where are we in New
17 Jersey?

18 MR. AXLINE: There are a few more settlements, your
19 Honor, that are in the works that we anticipate submitting to
20 you very rapidly. After that I think the case is going to be
21 ready to be remanded.

22 THE COURT: Okay. So that will take it off my docket.

23 MR. RICCARDULLI: Your Honor, we spoke before the
24 conference. The parties are going to talk about whether or not
25 the case is ready for remand or not. You know, there's still a

Ea11mtbc

1 very large portion of this case that has remained untouched in
2 many ways, so we do want to have a conversation. We spoke
3 before this conference and said that we would talk and then be
4 prepared to address this issue at the next conference.

5 MR. AXLINE: So we did agree to talk about that, your
6 Honor. Our view is that the case is ready to be remanded. The
7 defense may have some other ideas.

8 THE COURT: Which court is it going to? There's one
9 court, District of New Jersey?

10 MR. AXLINE: Yes.

11 MR. RICCARDULLI: Yes, your Honor.

12 THE COURT: Are there different divisions? Does it go
13 to one place as opposed to another place?

14 MR. STACK: Trenton.

15 THE COURT: Why does it go there?

16 MR. STACK: That's where it was filed because of the
17 removal by the state bringing the action in Mercer County, New
18 Jersey, I believe, your Honor.

19 THE COURT: Okay. All right. So do we need a new
20 date? Because it doesn't sound like there's going to be much
21 of an agenda for New Jersey and I don't know what else is
22 active besides New Jersey and Puerto Rico now. I mean,
23 Pennsylvania is too new to be active. What else is there in
24 the MDL docket? Anything?

25 MR. CORRELL: Your Honor, Charles Correll. In the

Ea11mtbc

1 OCWB case, there are some motions still pending.

2 THE COURT: Still pending? I think we're working on
3 that. And that's it.

4 MR. PARDO: Other than that, your Honor, we're in the
5 middle of papering some settlements with some of the
6 plaintiffs. I think that's it.

7 THE COURT: Maybe this is one of the few times I'm not
8 going to set another conference date because it doesn't sound
9 like we have any agenda. I think I'll just wait until I hear
10 from any of you as to whether we need a conference and, if so,
11 on what. So I'll let you go without a conference date. Okay?

12 All right. Thank you.

13 ALL COUNSEL: Thank you, your Honor.

14 ooo

15

16

17

18

19

20

21

22

23

24

25